

UNITED STATES DISTRICT COURT

## EASTERN DISTRICT OF WASHINGTON

JULIO CESAR DELGADO,

Petitioner,

V.

No. CV-05-3029-FVS

RICHARD MORGAN,

### Respondent.

ORDER DISMISSING REQUEST FOR  
HABEAS CORPUS RELIEF

Respondent

**BEFORE THE COURT** is Julio Cesar Delgado's Petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254. (Ct. Rec. 5). The Petitioner ("Mr. Delgado") is represented by Aaron F. Dalan. The Respondent is represented by Assistant Attorney General Alex A. Kostin.

## BACKGROUND

Mr. Delgado is a state prisoner who was found guilty in Yakima Superior Court of one count of complicity to aggravated first-degree murder and three counts of complicity to attempted first-degree murder. On January 3, 2001, he was sentenced to life in prison without parole plus 780 months. Mr. Delgado then unsuccessfully appealed his conviction and sentence to the Washington Court of Appeals. His petition for review to the State Supreme Court was denied on September 5, 2003.

1       On December 24, 2003, Mr. Delgado filed a Petition for Writ of  
2 Habeas Corpus ("First Habeas Petition") pursuant to 28 U.S.C. § 2254  
3 in the United States District Court for the Eastern District of  
4 Washington. Magistrate Judge Imbrogno issued a Report and  
5 Recommendation ("Report") to dismiss Mr. Delgado's First Habeas  
6 Petition without prejudice based on his failure to exhaust state  
7 remedies. (Ct. Rec. 13, Ex. 10, at 4). This Report was ultimately  
8 adopted by the Court on September 16, 2004. (Ct. Rec. 13, Ex. 6,  
9 Attach. C). Mr. Delgado alleges he received a copy of the Report on  
10 September 9, 2004. (Ct. Rec. 13, Ex. 10, at 4). The Report stated  
11 that his deadline to seek state collateral relief was September 24,  
12 2004; he had consumed 271 of the 365 days he had to seek federal  
13 habeas relief; and he should be prepared to re-file his habeas  
14 petition immediately following the disposition of state collateral  
15 proceedings. (Ct. Rec. 13, Ex. 6, Attach C, at 7).

16       On September 27, 2004, Mr. Delgado filed a Personal Restraint  
17 Petition ("PRP") in Washington Court of Appeals, Division III. On  
18 October 13, 2004, the Court of Appeals dismissed the PRP as untimely  
19 because it was filed three days beyond the September 24, 2004,  
20 deadline. The Court of Appeals issued a Certificate of Finality  
21 dismissing the PRP on February 1, 2005. Mr. Delgado then filed a  
22 Petition for Writ of Habeas Corpus ("Second Habeas Petition") on March  
23 14, 2005. The Respondent moves to dismiss the Second Habeas Petition  
24 on grounds it is untimely.

25           **RULING**

26       A person seeking federal habeas relief must file a petition

1 within one year of the date when the period for direct review of the  
2 state court judgment expires. 28 U.S.C. § 2244(d)(1). Mr. Delgado's  
3 one-year statute of limitations ran on December 1, 2004, one year  
4 after his deadline for seeking direct review by way of certiorari to  
5 the United States Supreme Court. See *Bowen v. Roe*, 188 F.3d 1157,  
6 1159 (9th Cir. 1999) (holding that when a petitioner does not seek a  
7 writ of certiorari from the United States Supreme Court, the  
8 2244(d)(1)(A) one-year statute of limitations runs from the deadline  
9 for seeking certiorari). Mr. Delgado concedes that his Second Habeas  
10 Petition is untimely because he did not file it until March 14, 2005.

11 Mr. Delgado also agrees that statutory tolling is inapplicable.  
12 28 U.S.C. § 2244(d)(2). The statute of limitations for filing a  
13 federal habeas petition is tolled while a "properly filed" application  
14 for state collateral relief is pending. *Id.* A post-conviction  
15 petition rejected by state courts as untimely is not "properly filed."  
16 *Pace v. DiGuglielmo*, 544 U.S. 408, --, 125 S.Ct. 1807, 1810, 161  
17 L.Ed.2d 669(2005). Therefore, the one-year statute of limitations was  
18 not tolled during state court review of Mr. Delgado's untimely PRP.  
19 Consequently, Mr. Delgado seeks to invoke the doctrine of equitable  
20 tolling for the 128-day period when state review of his PRP was  
21 pending. If the statute of limitations were equitably tolled, Mr.  
22 Delgado would have exhausted only 340 days of the 365-day period for  
23 filing his Second Habeas Petition.

24 A litigant seeking equitable tolling bears the burden of  
25 establishing that extraordinary circumstances, rather than a lack of  
26 diligence, precluded him from filing a timely habeas corpus petition.

1       Pace, 544 U.S. at --, 125 S.Ct. at 1814-1815. Mr. Delgado alleges that  
2 two extraordinary circumstances beyond his control warrant equitable  
3 tolling.

4       First, he points to delay on behalf of Department of Corrections  
5 officials in copying and mailing his PRP. Mr. Delgado submitted the  
6 PRP to Department of Corrections officials one day before the  
7 September 24, 2004, deadline. He incorrectly believed that the  
8 mailbox rule applied, such that the PRP would be deemed filed when he  
9 handed it to the officials. Cf. *In re Carlstad*, 150 Wn.2d 583, 591,  
10 80 P.3d 587, 590-91 (2003) (holding that the mailbox rule for *pro se*  
11 petitioners is inapplicable to the filing of a PRP). While a *pro se*  
12 petitioner may not be held to the same technical standards as  
13 litigants represented by counsel, he is expected to understand the  
14 statute of limitations applicable to his case. *Biggs v. Duncan*, 339  
15 F.3d 1045, 1048 n.2 (9th Cir. 2003). The untimely filing of Mr.  
16 Delgado's PRP resulted from his lack of diligence in investigating the  
17 proper deadline. Based on this error, he did not allow enough time  
18 for Department of Corrections officials to mail and copy the PRP.  
19 Therefore, the Court concludes that any administrative delays at the  
20 Department of Corrections were not extraordinary circumstances.

21       Second, Mr. Delgado contends he detrimentally relied on Ninth  
22 Circuit case law indicating the one-year statute of limitations for  
23 filing his Second Habeas Petition was tolled during state court review  
24 of his untimely PRP. See 28 U.S.C. § 2244(d)(2); *Dictado v. Ducharme*,  
25 244 F.3d 724, 728 (9th Cir. 2001), overruled by *Pace*, 544 U.S. at --,  
26 125 S.Ct. at 1810 (holding that an untimely PRP is not "properly

1 filed" for purposes of statutory tolling under 28 U.S.C.  
2 § 2244(d)(2)). Mr. Delgado was advised by Magistrate Judge Imbrogno  
3 that if he wished to file a Second Habeas Petition, he "should be  
4 prepared to proceed immediately" upon disposition of final state  
5 proceedings. (Ct. Rec. 13, Ex. 6, Attach. C, at 7). If he intended  
6 to file his Second Habeas Petition later than Magistrate Judge  
7 Imbrogno advised, in reliance on *Dictado v. Ducharme*, Mr. Delgado  
8 should have sought clarification from the Court that this decision  
9 justified his action. By failing to make such an inquiry, Mr. Delgado  
10 relied on the subsequently overruled decision at his own risk. The  
11 Court determines that Mr. Delgado's detrimental reliance on Ninth  
12 Circuit law is not an extraordinary circumstance.

13 Furthermore, Mr. Delgado failed to diligently pursue his rights  
14 in filing his Second Habeas Petition. As early as October 13, 2004,  
15 when the Court of Appeals dismissed his PRP as untimely, Mr. Delgado  
16 received notice of the chance that this ruling would be affirmed by  
17 the Washington Supreme Court. In order to have diligently pursued his  
18 rights, Mr. Delgado should have begun preparing his Second Habeas  
19 Petition while state court review of his PRP was pending. By doing so,  
20 he would have been prepared to file immediately in federal court as  
21 Magistrate Judge Imbrogno recommended.

22 In light of the preceding considerations, the Court concludes  
23 that equitable tolling of the statute of limitations is unwarranted  
24 and Mr. Delgado's Petition for Writ of Habeas Corpus is untimely.  
25 Accordingly,

**IT IS HEREBY ORDERED** that Mr. Delgado's Petition for Writ of Habeas Corpus (Ct. Rec. 5) is **DISMISSED WITH PREJUDICE**.

**IT IS SO ORDERED.**

The District Court Executive is hereby directed to enter this order, furnish copies to counsel and the Petitioner, **ENTER JUDGMENT** and **CLOSE THE FILE**.

**DATED** this 29th day of March, 2006.

s/ Fred Van Sickle  
Fred Van Sickle  
United States District Judge